

D.P.U. 91-DS-6

Adjudicatory hearing in the matter of a possible violation of
G.L. c. 82, § 40, by J.F. White Contracting Company.

APPEARANCES: Gail Soares, Investigator
 Robert Smallcomb, Acting Director
 Department of Public Utilities
 100 Cambridge Street
 Boston, Massachusetts 02202
 FOR: THE PIPELINE ENGINEERING AND
 SAFETY DIVISION

Daniel Della-Giustina, Safety Director
Jack Harney, Project Engineer
J.F. White Contracting Company
One Gateway Center
Newton, Massachusetts 02158
 PRO SE
 Respondent

I. INTRODUCTION

On June 19, 1991, the Boston Edison Company ("BECo") filed an underground damage report with the Pipeline Engineering and Safety Division ("Division") of the Department of Public Utilities ("Department"). The damage report stated that J.F. White Contracting Company ("J.F. White" or "Respondent") had damaged an electric cable while excavating under the West Fourth Street Bridge in South Boston at approximately 2 p.m. on June 15, 1991. On July 15, 1991, the Division issued a Notice of Probable Violation ("NOPV") to J.F. White. The NOPV stated that the Division had reason to believe that J.F. White performed excavations under the West Fourth Street Bridge in South Boston in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). J.F. White allegedly failed to properly notify underground utility operators of the excavation and failed to exercise reasonable precaution.

On August 1, 1991, J.F. White filed a letter with the Division in which it contested the allegations made by the Division in the NOPV. On August 16, 1991, the Division sent a letter to J.F. White which stated that the Division had examined all of the facts available in the case and had determined that J.F. White had in fact violated the Dig-Safe Law. The letter included a consent order for its signature. The letter also

stated that J.F. White could request an adjudicatory hearing or submit written comments.

On August 22, 1991, J.F. White formally requested an adjudicatory hearing, pursuant to the procedure set forth in the Division's letter of August 16, 1991. Pursuant to notice duly issued, an evidentiary hearing was held on Wednesday, February 17, 1993, at the Department's offices in Boston. At the hearing, the Division presented the testimony of one witness: John Kingston, underground transmission supervisor at BECo. The Respondent presented the testimony of two witnesses: Daniel Della-Giustina, safety director at J.F. White; and Jack Harney, project engineer at J.F. White. The Division offered seven exhibits, all of which were admitted into evidence. On March 3, 1993, both the Division and J.F. White filed briefs.

II. SUMMARY OF FACTS

This case arises from an incident that occurred in the railroad yard under the West Fourth Street Bridge in South Boston on June 15, 1991, when a supervisor employed by J.F. White cut into a live 13.8 kilovolt (kV) three-and-one-half inch iron conduit while cutting away existing dead conduits (Exh. DPU-1; Tr. at 7, 42). J.F. White is disputing the finding of the Division that J.F. White violated the Dig-Safe Law by failing to properly notify underground utility operators of the excavation and by failing to exercise reasonable precaution while excavating

(Exh. DPU-3; Exh. DPU-4; Exh. DPU-6; Tr. at 5,6).

On March 7, 1991, Scott Buckman, an engineer and employee of J.F. White, called Dig Safe System, Inc. ¹ to report the Respondent's plan to excavate in South Boston (Exh. DPU-4, at 4). The location is described on the Dig-Safe ticket, ² number 91103074, as Widett Circle, South Boston, east side of the street, between the warehouse and the railroad tracks, with the intersecting street at the East Berkeley Street exit off the Expressway (id.). The ticket states that J.F. White will be installing a 12-inch duct line and water main, to a depth of five feet in the street, and that the work will commence at 3:15 p.m. on March 12, 1991 (id.).

The Respondent's witness, Mr. Harney, testified that the Respondent used the Widett Circle area for a "call-off" with the mark-out inspectors, since the Respondent was working over an extensive area (Tr. at 27-28). The Respondent's office trailer was located at Widett Circle (id. at 28). Mr. Harney testified

¹ Dig Safe System, Inc. was formed by underground utility companies pursuant to G.L. c. 164, § 76D, to serve as a clearinghouse for information on excavations throughout Massachusetts.

² A "ticket" is a document produced by the Dig Safe System, Inc. that describes the proposed excavation in a summarized format. The ticket is transmitted to all underground utility companies and serves as notice to them of the excavation.

that, during the course of the project, mark-out inspectors would stop by the Respondent's Widett Circle office trailer, where the Respondent would describe the location and type of work planned so that the mark-out inspectors could mark lines in the appropriate area (id. at 30,31). Mr. Harney testified that the Respondent spoke with BECo regarding the marking of the entire area between Widett Circle and the West Fourth Street Bridge (id. at 34,35). The Division's witness, Mr. Kingston, testified that he never received any requests for the marking of the area under the West Fourth Street Bridge (id. at 14).

On March 12, 1991, Mr. Buckman sent a letter to the attention of Donald G. Sacco at the Energy Service Department of BECo in which he requested that BECo remove several electrical boxes, a transformer, an electrical manhole, and a 13.8 kV station ("pad mount") from beneath the West Fourth Street Bridge in South Boston (Exh. DPU-5, at 1). This request was made pursuant to a contract between the Respondent and the Massachusetts Bay Transportation Authority ("MBTA") that required the described work to be completed (id.). Mr. Harney testified that the letter to BECo resulted in a meeting between Mr. Sacco and himself on the issues of the division of labor on the project between BECo and J.F. White and whether any excavation would be necessary (Tr. at 30). Mr. Harney also testified that it takes approximately 60 days to get an action by BECo on the removal of

a pad mount (id. at 32). As a result, J.F. White notified BECo well in advance of the projected removal date to ensure that the work would be completed as scheduled (id.).

Mr. Harney testified that the pad mount was removed in mid-May, at which time the lines were exposed (id.). According to Mr. Harney's testimony, BECo and J.F. White collaborated on the removal of the pad mount and the excavation of the lines (id.). Mr. Harney testified that the cables were lying on the ground after the pad mount removal work had been completed by BECo and the Respondent (id. at 36).

Mr. Harney testified that, on the day the incident occurred, J.F. White was removing the dead conduits in preparation for grading the ballast for a new MBTA railroad line to run through the site (Tr. at 27). The underground damage report submitted by BECo states that J.F. White was excavating when the incident occurred (Exh. DPU-1). The report was prepared by Mr. Kingston, who testified that he was not actually on site the day the incident occurred, but rather received his information from a BECo field inspector (Tr. at 16-18).

Mr. Harney testified that at the time the incident occurred, the Respondent had already uncovered all conduits in the area (Tr. at 27). The day had been reserved for removal of dead conduits (id.). Mr. Harney testified that the incident occurred when a J.F. White supervisor who was cutting away existing dead

conduits slipped and cut into an exposed live conduit (id.).

III. STANDARD OF REVIEW

G.L. c. 82, § 40, in pertinent part, provides that:

No person shall, except in an emergency, contract for, or make an excavation ... unless at least seventy-two hours ... but not more than thirty days ... before the proposed excavation is to be made such person has given an initial notice in writing of the proposed excavation to such natural gas pipeline companies, public utility companies, cable television companies and municipal utility departments as supply gas, electricity, telephone or cable television service in or to the city or town where such excavation is to be made. Such notice shall set forth the name of the street or the route number of said way and a reasonably accurate description of the location in said way or on private property the excavation is to be made.

The statute requires that any person who contracts for or conducts an excavation ³ must provide advance notice and a reasonably accurate description ⁴ of the excavation site to the

³ An excavation is the movement or removal of earth, rock, ledge, or other materials in the ground to form a cavity, hole, hollow, or passage therein. It includes, but is not limited to, digging, trenching, grading, scooping, tunneling, augering, boring, drilling, pile driving, plowing-in or pulling-in pipe, cable, wire, conduit, or other substructure, backfilling, demolition of any structure, and blasting, except blasting in a quarry. Excavation does not include gardening or tilling the soil in the case of privately-owned land. 220 C.M.R. § 99.02.

⁴ Guidelines for what constitutes "reasonably accurate" have been set forth in 220 C.M.R. § 99.04. According to this regulation, a reasonably accurate description includes: (a) the city or town where the excavation will take place; (b) the name of the street, way or route number of the excavation site; (c) the name of the streets at the nearest intersection to the excavation; (d) the number of the

operators of underground utilities. R.J. Cincotta Co., Inc.,
D.P.U. 89-DS-76 (1990); Todesca Equipment Co., Inc.,
D.P.U. 89-DS-14 (1990). The initial notice may be served on each
underground utility company individually or delivered to the
public utility underground plant damage prevention system
pursuant to the provisions of G.L. c. 164, § 76D. G.L. c. 82,
§ 40; G.L. c. 164, § 76D.

If the excavation is to take place in a public way, the
person planning to undertake the excavation must file copies of
the notice with the officer or board having charge of the public
way, along with a statement certifying that it was mailed or
delivered to the appropriate underground utility companies. G.L.
c. 82, § 40. The person planning to excavate is required to
obtain all necessary permits prior to the excavation. Id.

The statute provides that the affected underground utility
companies must respond within 72 hours to the initial written
notice or subsequent oral or written notice by designating at the
locus of excavation, the location of pipes, mains, wires, or
conduits, in that portion of the public way, public utility
right-of-way or easement, or privately-owned land in which the

building closest to the excavation; (e) any other
descriptions of the excavation site including landmarks and
utility pole numbers; and (f) the date and location of any
blasting. 220 C.M.R. § 99.04(1)(a) through (f).

excavation is to be made. Id.

Regarding reasonable precaution, G.L. c. 82, § 40, in pertinent part, provides that:

Any such excavation shall be performed in such a manner, and such reasonable precautions taken to avoid damage to the pipes, mains, wires, or conduits in use under the surface of said public way, public utility company right-of-way or easement, or privately-owned land....

If the excavation is part of work required by a contract with the Commonwealth or with any political subdivision thereof or other public agency, the person planning to undertake the excavation must nevertheless comply with all of the requirements of the statute. G.L. c. 82, § 40.

IV. POSITION OF PARTIES

A. Respondent

The Respondent asserts that it is a safety conscious and responsible contractor and did not violate the Dig-Safe law (Tr. at 40). The Respondent states that it is very familiar with Dig-Safe rules and regulations and that it contacted Dig Safe System, Inc. and other utilities and did have all utilities properly marked (Tr. at 5,6; 29). The Respondent also states that the entire job was covered under the Widett Circle address and that the whole area where the damaged cable was located was in fact an area that was marked out by various utilities (Respondent Brief at 1; Tr. at 26). The Respondent further

states that it had met with BECo officials about this issue prior to excavation (Respondent Brief at 1; Tr. at 26.).

B. Division

The Division contends that J.F. White has violated the Dig-Safe Law. The Division alleges that J.F. White did not properly notify Dig Safe System, Inc. of its intention to excavate, did not request a re-mark during the 100 days following the original request, and failed to exercise reasonable precaution while excavating, resulting in damage to a 13.8 kV cable owned by BECo (Division Brief at 1-3).

V. ANALYSIS AND FINDINGS

In order to determine whether a person has violated the Dig-Safe law, the Department must determine whether there has been a violation of any specific provision of G.L. c. 82, § 40.

According to evidence introduced at the hearing, J.F. White notified Dig Safe System, Inc. of a planned excavation at Widett Circle in South Boston by phone on March 7, 1991. The Dig-Safe ticket indicates that the work would take place on March 12, 1991. The Dig-Safe Law requires that notification of a planned excavation be delivered either to the individual underground utility companies or to Dig Safe System, Inc. at least 72 hours, but not more than 30 days, prior to the excavation. We therefore find that the initial written notice of the planned March 12,

1991 excavation did not violate the Dig-Safe law.

The second issue is whether the subsequent oral and written notice of the planned pad mount removal and excavation and exposure of various electrical conduits in the area was sufficient under the Dig-Safe Law. Given the evidence and the sworn testimony of J.F. White as to the nature and extent of the contacts between J.F. White and BECo and other underground utility companies during the course of J.F. White's work in the Widett Circle area, we find that the written and oral notice subsequent to the initial written notice was sufficient and did not violate the Dig-Safe Law.

The third issue is whether J.F. White's failure to request a re-mark during the period from March 12, 1991 to June 15, 1991 was a violation of the Dig-Safe Law. After reviewing the evidence and the sworn testimony of J.F. White as to the nature and extent of the contacts between J.F. White and BECo and other underground utility companies during the course of J.F. White's work in the Widett Circle area, we find that J.F. White was not required to request a re-mark during this period and therefore did not violate the Dig-Safe Law.

The final issue presented by this matter is whether J.F. White violated the Dig-Safe Law by failing to exercise reasonable precaution while removing existing dead conduit and cutting into an exposed live conduit on June 15, 1991. In making this

determination, the threshold question is whether J.F. White damaged the live BECo conduit in the course of an excavation. After reviewing the evidence in this matter, we find that J.F. White was not engaged in an excavation at the time of the incident in question, but had returned to the work site on that day to remove dead conduit that it had previously exposed. Accordingly, we find that J.F. White did not violate the Dig-Safe Law when it damaged the BECo conduit on June 15, 1991.

VI. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the notice of probable violation issued by the Division of Pipeline Engineering and Safety against J.F. White Contracting Company shall be and is hereby dismissed.

By Order of the Department,